

1 JOSEPH P. RUSSONIELLO (CABN 44332)  
2 United States Attorney

3 BRIAN STRETCH (CABN 163973)  
4 Chief, Criminal Division

5 DENISE MARIE BARTON (MABN 634052)  
6 Assistant United States Attorney

7 450 Golden Gate Avenue, Box 36055  
8 San Francisco, California 94102  
9 Telephone: (415) 436-7359  
10 Facsimile: (415) 436-7234  
11 denise.barton@usdoj.gov

12 Attorneys for Plaintiff

13  
14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16 SAN FRANCISCO DIVISION

17  
18 ) CR No. 07-678 JSW  
19 ) MEMORANDUM IN OPPOSITION TO  
20 ) DEFENDANT SILVA'S MOTION TO  
21 ) DISMISS FOR SELECTIVE  
22 ) PROSECUTION AND PURSUANT TO  
23 ) THE COURT'S SUPERVISORY POWERS  
24 )  
25 ) Hearing Date: August 21, 2008, 2:30 pm  
26 ) Courtroom: Floor 17, Ctrm 2  
27 )  
28 )

MEMORANDUM IN OPPOSITION TO DEFENDANT SILVA'S MOTION TO DISMISS FOR SELECTIVE  
PROSECUTION AND PURSUANT TO THE COURT'S SUPERVISORY POWERS - CR 07-678 JSW

The defendant has failed to adduce any evidence in support of the threshold showing to support a claim of selective prosecution. And, he provides no support for his Motion to Dismiss pursuant to the Court's supervisory powers. For the reasons set forth below, his Motion to Dismiss should be denied.

## I. BACKGROUND

The complaint and indictment charging the defendant with one count of Alien Harboring, in violation of Title 8 of the United States Code, section 1324(a)(1)(A)(iii) followed a lengthy investigation in which ICE Agents engaged in surveillance of Silva's businesses from March 2007 through execution of search warrants in June 2007. *See generally Complaint, ECF Docket No. 1 and Indictment, ECF Docket No. 21.* This investigation was conducted by the ICE, Worksite Enforcement Unit, which investigates matters concerning the unlawful employment, smuggling, and harboring of certain aliens in violation of Title 8, United States Code, Sections 1324 et. al. *See Declaration of ICE Special Agent Christopher Purfeerst ("Purfeerst Declaration"), ¶ 2, ECF Docket No. 64.* Contrary to defendant's assertions, the investigation and prosecution of Silva was not motivated by or related to his race, religion, sex, national origin, or other arbitrary classification. *See Purfeerst Declaration, ¶ 3, ECF Docket No. 64.* The case was investigated after worksite enforcement was set as an ICE priority in early 2007. *See Purfeerst Declaration, ¶ 2, ECF Docket No. 64.*

On May 15, 2008, this Court heard and denied the Defendant's Motion to Compel Discovery, *ECF Docket No. 57*, in support of a claim of selective prosecution. *See Minute Order, dated May 15, 2008, ECF Docket No. 70*. In denying the defendant's Motion, this Court held that

in *Armstrong*, the Supreme Court held that with respect to the discriminatory-effect element in a case of selective prosecution based upon race, this requires a defendant to put forth some evidence that, quote, "similarly situated defendants of other races could have been prosecuted but were not." End quote. And, that's at 469 of that case.

1 *Transcript of Proceedings, dated May 15, 2008, Exhibit 4 to Barton Declaration, p. 11.*

2 The Court further ruled that

3 In this case, the defendant attests that the United States  
 4 Attorney's Office has chosen to prosecute only three Work  
 5 Site Enforcement cases. And, notwithstanding that, and  
 6 notwithstanding the offers that are made by Counsel, the  
 7 defendant has not put forth any evidence regarding those  
 8 cases it has -- that the Government has chosen not to  
 9 prosecute. Instead, the defendant appears to rely on the  
 10 description of the Work Site Enforcement program, and  
 11 contents that this case and the other cases that have been  
 12 prosecuted do not fall within its parameters. Thus, even if the  
 13 defendant's theory is that the Government is acting in an  
 14 arbitrary fashion with respect to the prosecution of these types  
 15 of cases, the Court -- the record still fails to show evidence  
 16 showing the manner in which the Government acted  
 17 arbitrarily.

18 *Transcript of Proceedings, dated May 15, 2008, Exhibit 4 to Barton Declaration, pp. 12-13.*

## 19 II. ARGUMENT

### 20 A. The Defendant Has Failed To Present Any Evidence In Support of His 21 Selective Prosecution Claim

22 It is well-established that the United States has broad discretion in charging  
 23 decisions. *United States v. Wayte*, 470 U.S. 598, 607-608 (1985). "So long as the  
 24 prosecutor has probable cause to believe that the accused committed an offense defined  
 25 by statute, the decision whether or not to prosecute, and what charge to file or bring  
 26 before a grand jury, generally rests entirely in [her] discretion." *Id.* Absent clear evidence  
 27 that the government has not properly exercised its duties - such as a properly supported  
 28 claim of selective enforcement - "courts can presume that [prosecutors] have properly  
 discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

29 A selective prosecution claim is based in an equal protection standards, a  
 30 protection against disparate treatment of similarly situated persons. To make out a claim  
 31 of selective prosecution, the defendant must show that the prosecutorial policy  
 32 1) had a discriminatory effect and

1           2) was motivated by a discriminatory purpose.

2       *United States v. Armstrong*, 517 U.S. at 463-65 (1996); *United States v. Turner*, 104 F.3d  
 3       1180, 1184 (9<sup>th</sup> Cir. 1997)( “[t]he kind of intent to be proved is that the government  
 4       undertook a particular course of action at least in part 'because of,' not merely 'in spite of'  
 5       its adverse effects upon an identifiable group.”)(quotations and citation omitted). In  
 6       *Armstrong*, the Court held that “[w]e think the required threshold-a credible showing of  
 7       different treatment of similarly situated persons-adequately balances the Government's  
 8       interest in vigorous prosecution and the defendant's interest in avoiding selective  
 9       prosecution.” *Armstrong*, 517 U.S. at 469-70.

10       In *United States v. Gonzales*, another district was presented with and denied a  
 11       similar challenge that the one now raised by defendant. No. 07CR140-P.B., 2008 WL  
 12       160636 (N.D. Miss. January 15, 2008). In *Gonzales*, the defendants moved to dismiss the  
 13       indictment on the ground of selective prosecution claiming that he was chosen for  
 14       prosecution because he was Hispanic. As “proof” of his claim, he asserted that other  
 15       contractors had illegal aliens on their payrolls but were not prosecuted. *Id.* at \*9. The  
 16       court held that the defendants (1) failed to make a *prima facie* showing of selective  
 17       prosecution because they had failed to show that similarly situated contractors were not  
 18       prosecuted and (2) failed to present any evidence aside from conclusory allegations that  
 19       the Government prosecuted him based on his Hispanic origin. *Id.* Just as the defendant  
 20       did in *Gonzalez*, the defendant in this case failed to provide evidence of selective  
 21       prosecution but rather proffers unsupported claims of unfairness and arbitrary action.  
 22       enforcement

23       Not only has the defendant failed to make the requisite threshold showing, he has  
 24       outright failed to allege any discriminatory effect or purpose as a result of a protected  
 25       class to which he belongs. As the Court held in *Armstrong*, “if the claim of selective  
 26       prosecution were well founded, it should not have been an insuperable task to prove that  
 27       persons of other [nationalities] races were being treated differently than respondent[ ].”

1      Armstrong, 517 U.S. at 470. It was not until the hearing on the *Motion to Compel*  
 2      *Discovery* hearing that the defendant even identified “nationality” as the basis for his  
 3      claim. *Transcript of Proceedings, dated May 15, 2008, Exhibit 4* to Barton Declaration,  
 4      pp. 3-4. In neither the *Motion to Compel Discovery* nor the instant Motion has the  
 5      defendant proffered any evidence that other persons of Portuguese nationality were being  
 6      treated different than the defendant or that the prosecutorial action was motivated by  
 7      discriminatory intent towards Portuguese nationals. The “new” evidence that is set forth  
 8      as Exhibits B-F to the Declaration of Steven F. Gruel, *ECF Docket No. 78*, also fails to  
 9      present any such proof. Neither a material witness’ testimony nor an Order of a State  
 10     Labor Authority inform - either directly or indirectly - on the discriminatory effect or  
 11     Government’s. This Court has already held that this type of evidence is not sufficient to  
 12     make out a showing for discovery on a selective prosecution claim. *Transcript of*  
 13     *Proceedings, dated May 15, 2008, Exhibit 4* to Barton Declaration, pp. 11-13. For the  
 14     same reasons set forth by this Court in its May 15, 2008 opinion and those set forth above,  
 15     this Court should deny defendant’s Motion to Dismiss.

16                    **B.      The Defendant Has Failed To State Any Grounds That Would**  
 17                    **Warrant Dismissal Pursuant the Court’s Supervisory Powers**

18      By his own admission, the defendant cannot direct the Court to any authority that  
 19      supports his request for dismissal pursuant to the supervisory powers of the Court. In  
 20      fact, no such authority exists. “The Supreme Court has recognized only three legitimate  
 21      bases for the exercise of the supervisory power: to implement a remedy for the violation  
 22      of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring  
 23      that a conviction rests on appropriate considerations validly before a jury; and to deter  
 24      future illegal conduct.” *United States v. Hasting*, 461 U.S. 499, 505-506 (1983). None of  
 25      those considerations are at issue, or alleged to be at issue by the defendant, in this case.

26      Defendant’s incomplete and faulty interpretation of the evidence adduced at the  
 27      material witness depositions does not support dismissal under this Court’s supervisory  
 28

1 powers.<sup>1</sup> Further, neither of the cases cited by the defendant support his request. In  
 2 *United States v. Hasting*, to remedy what it perceived to be a repeated practice by  
 3 prosecutors in the circuit to comment on the silence of the defendant, the circuit court, in  
 4 an exercise of its supervisory powers, reversed a conviction in which the prosecutor  
 5 purportedly made such a comment without engaging in a harmless error analysis. 461  
 6 U.S. at 505-506. The Supreme Court held that this action by the court was an improper  
 7 exercise of supervisory powers and reversed. *Id.* at 512. In *United States v. Simpson*, the  
 8 district court twice dismissed an indictment on the grounds that the prosecution conduct  
 9 was outrageous. 927 F.2d 1088, 1090 (9<sup>th</sup> Cir. 1991). The Ninth Circuit twice reversed  
 10 the district court holding, in the last decision, that the district court had impermissibly  
 11 exercised supervisory powers for conduct that occurred outside of the courtroom and had  
 12 acted in a manner that violated the separation of powers doctrine. *Id.* at 1091.

13 This case is not one in which it would be appropriate or warranted for this Court to  
 14 exercise its supervisory powers to dismiss the indictment. Accordingly, the defendant's  
 15 Motion should be dismissed.

16 **IV. CONCLUSION**

17 For the reasons stated above, the United States respectfully requests that the Court  
 18 deny the defendant's Motion to Dismiss in all respects.

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20 JOSEPH P. RUSSONIELLO  
 21 United States Attorney

22 DATED: July 21, 2008

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 24 /s/  
 25 DENISE MARIE BARTON  
 26 Assistant United States Attorney

27  
 28 <sup>1</sup> The last material witness deposition was not cancelled for the reason speculated by the  
 defendant. Rather, the deposition was cancelled after defense counsel improperly used the prior  
 material witness deposition as a discovery tool rather than to preserve trial testimony, the purpose  
 of a material witness deposition.